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In the Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JAIRO JONATHAN ELIAS ZACARIAS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondent and his amici have abandoned the court of appeals' reasoning. In his brief in opposition (at 11-13), respondent defended the court's conclusion that a threat by two guerrillas to join them or face the consequences was "properly categorized" as "persecution on account of * * * political opinion," 8 U.S.C. 1101 (a)(42)(A), because the persecutors' ultimate goal was political. Pet. App. 12a. Neither respondent nor his amici now advance that position. It is thus common ground that "persecution on account of * * * political opinion" refers to the asylum applicant's political opinion, not (as the court of appeals thought) the guerrilla group's "political goals." Pet. App. 18a. The latest positions offered by respondent and his amici, however, are no more faithful to the Refugee Act than the earlier one.

1. The ordinary meaning of "persecution on account of * * * political opinion" is that the intentional infliction

of harm (the "persecution") must be because of ("on account of") the applicant's political beliefs. Gov't Br. 12-14.

a. Respondent and his amici would go further. They would extend asylum eligibility to anyone who fears harm threatened not because of his political opinion but because of his conduct, as long as that conduct is motivated by a political opinion. Thus, respondent argues that an applicant is eligible for asylum if he (1) commits an act, such as refusing to join a guerrilla organization, "on account of * * * political opinion" and (2) is threatened for that act. Resp. Br. 6, 8, 10, 12. Amicus United Nations High Commissioner for Refugees (UNHCR) reaches the same result by watering down the "on account of" clause: according to the UNHCR, "[t]he 'on account of' * * * language requires only that there be some nexus between an opinion that can be characterized as political and the risk of harm." UNHCR Br. 17. Those interpretations contravene the Refugee Act and confuse persecution with suffering generally.

i. Respondent's interpretation is foreclosed by the terms of the Refugee Act. The Act extends asylum only to applicants who fear "*persecution* on account of * * * political opinion," not harm threatened on account of *an act* undertaken on account of political opinion. As the UNHCR points out in the *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 81 (Geneva 1979) (emphasis added): "It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, *and the fact that it has led or may lead to the persecution that he claims to fear.*" Thus, the applicant's political opinion, not the behavior motivated by that opinion, must be what leads to the persecution.[1]

[1] The fallacy of respondent's interpretation is made apparent by substituting "refusing to join a guerrilla group" for "persecution" in the Refugee Act. See Resp. Br. 6, 8, 10, 12. With that change, the Act extends asylum eligibility to anyone who has "a well-founded fear of [refusing to join a guerrilla group] on account of * * * political opinion." A victim of forced recruitment, however, does not fear refusing to join a guerrilla group, he fears the consequences of that refusal. And it does not follow from the premise that the *refusal* is because of the applicant's political opinion that the *consequences* occur for the same reason.

Although the UNHCR's interpretation does not require rewriting the Refugee Act, it does require the use of an idiosyncratic definition of "on account of." The UNHCR defines that phrase to mean "nexus." As we pointed out in our opening brief, however, Gov't Br. 13, the contextual definition of that phrase is "because of" or "by reason of." *Webster's Second New International Dictionary of the English Language* 16 (1957); *The Random House Dictionary of the English Language* 10 (1966). The applicant's political opinion must not merely relate to the threat of harm through some lengthy chain of causation —it must be the reason *why* the persecutor issues his threat. Cf. *Wayte* v. *United States*, 470 U.S. 598, 610 (1985) (using "because of" to mean an intention to inflict "adverse effects upon an identifiable group" (quoting *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979)).

ii. More fundamentally, both respondent's and the UNHCR's interpretations confuse persecution with suffering generally. That confusion is capsulized in the UNHCR's observation that "[a]lthough the motivation of a persecutor may be relevant, ultimately it is the fact of persecution, not any specific intent to persecute, that one reasonably fears and from which the Refugee Act seeks to provide protection." UNHCR Br. 15-16.

Contrary to the UNHCR's supposition, the "ordinary meaning" of "persecution," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987), does not comprehend unintentional infliction of harm. Gov't Br. 13. We do not use the term "persecute" to describe the accidental or incidental imposition of harm: negligent drivers do not "persecute" slow-moving pedestrians and natural disasters do not "persecute" humanity. What distinguishes persecution

from any other harm is *why* the victim is singled out: persecution is the infliction of suffering *to punish an individual for possessing a belief or characteristic* the persecutor seeks to overcome. *Matter of Acosta*, 19 I. & N. Dec. 211, 223 (BIA 1985), modified on other grounds, *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).[2] Thus, where the applicant expresses a political opinion and the persecutor singles out the applicant in order to punish him *for his opinion*, the applicant is a refugee. But where the applicant is punished for conduct without regard for his opinion, the punishment is for his act, not his opinion. It is the motivation for imposing harm that distinguishes persecution from all other forms of oppression. *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 513 (BIA 1988).[3]

The implications of respondent's and the UNHCR's redefinitions of "persecution" are startling. If they are right, this Court has routinely upheld acts of "political persecution" against First Amendment challenge, including: a criminal conviction for burning a draft card to protest the Vietnam War, *United States* v. *O'Brien*, 391 U.S. 367 (1968); an indictment for failing to register

[2] Contrary to amicus UNHCR's contention, Br. 11 n.16, the fact that persecution is, by its nature, intentional does not render the "on account of" phrase redundant. That phrase specifies what types of persecution make an applicant eligible for asylum.

[3] Respondent and the UNHCR contend that because the Refugee Act looks to the applicant's fear, it focuses on the applicant's state of mind rather than the persecutor's. Resp. Br. 8-9 & n.11; UNHCR Br. 11-12. That formulation, however, begs the question of *what* the applicant fears. To fear "persecution on account of * * * political opinion," the asylum applicant must fear that the persecutor will single him out *because of his opinion*; a fear that something else may motivate the persecutor to harm him will not suffice. Furthermore, the fear must be "well-founded." 8 U.S.C. 1101(a)(42). Thus, objective facts must support the applicant's belief that his political opinion may motivate the persecutor to single him out for punishment. Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. at 440.

for the draft based on the registrant's letter of protest, *Wayte* v. *United States*, *supra*; a regulatory ban on sleeping in a public park to protest the plight of the homeless, *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984); and a city's ban on posting of all signs on public property, *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984). In each case, those invoking the First Amendment sought protection for conduct they engaged in "on account of" their political opinion. In each case, the Court denied protection because the government may ordinarily punish conduct motivated by political beliefs as long as the sanction is not aimed at the belief. Yet under respondent's analysis, the government actions this Court upheld all represent paradigm cases of persecution, for the individuals were singled out and punished (or threatened with punishment) on account of politically motivated conduct. Either the First Amendment condones political persecution, or respondent's and the UNHCR's understanding of that concept is profoundly wrong.

b. The practice of other countries is consistent with that of the United States: punishment for acts motivated by an asylum applicant's political opinion is not necessarily persecution "for reasons of * * * political opinion" under the 1951 Convention or the 1967 Protocol or municipal legislation implementing those acts.

In *Musial* v. *Minister of Employment and Immigration*, 1 F.C. 290 (Fed. Ct. Can. 1981), an alien in Canada feared he would be disciplined for evading Poland's draft. *Id.* at 291, 293. He had refused to serve because he opposed the Polish army's participation in the Soviet occupation of Afghanistan. *Ibid.* He urged what respondent urges today: that punishing him for conduct motivated by political opinion is persecution by reason of political opinion. *Id.* at 291, 293-294. The Canadian Court of Appeals rejected that argument, adopting the position the government urges in this case:

> [The alien's] "liberal interpretation" of the definition of the word "refugee" appears to me to be in-

> compatible with the requirement of that definition that a refugee have "a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion." A person who is punished for having violated an ordinary law of general application, is punished for the offence he has committed, not for the political opinions that may have induced him to commit it.

Id. at 294 (Pratte, J., joined by Culliton, D.J.).[4]

Amici Lawyers Committee for Human Rights et al., Br. 6-13, rely on decisions upholding the claims of religious conscientious objectors (principally Jehovah's Witnesses) who claim that the enforcement of universal conscription laws burdens their religious freedom and thereby constitutes persecution on account of their religion. Those decisions do not support respondent's position.

First, the authorities on which amici Lawyers Committee rely distinguish between religious conscientious objectors and applicants who, like respondent, claim to fear persecution on account of political opinion. The UNHCR's *Handbook* (¶ 172) states that a sincere religious conscientious objector whose "convictions are not taken into account by the authorities of his country in requiring him to perform military service * * * may be able to establish a claim to refugee status." No parallel provision exists for applicants who seek asylum because of "persecution on account of * * * political opinion." Cf. *id.* ¶ 171 ("It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action."). Thus, although amici Lawyers Committee are correct that the Canadian Immigration Appeal Board (the Canadian counterpart of the United States Board of Immigration Appeals) has held that punishment of Jehovah's Witnesses for draft

[4] Thus, Amici Lawyers Committee for Human Rights et al.'s reliance on decisions of the Canadian Board of Immigration Appeals, Br. 14-17, is misplaced. Decisions of the Federal Court of Appeal are superior to those of the administrative Board.

evasion is persecution on account of religion, the Canadian Court of Appeals—which is superior to that administrative board—unanimously held that, regardless of the status of punishment for religiously motivated conduct, punishment for conduct motivated by *political opinion* is not persecution. *Musial*, 1 F.C. at 292-293 (opinion of Thurlow, C.J.); *id.* at 294 (opinion of Pratte, J., joined by Culliton, D.J.). It is not necessary in this case to determine the circumstances in which religious conscientious objectors would be eligible for asylum.[5]

Second, by highlighting the decisions that granted asylum to religious conscientious objectors, amici Lawyers Committee suggest that state practice is uniform on this subject. Br. 9-13. It is not. The UNHCR itself has appeared on both sides of the debate. See *Matter of Canas*, 19 I. & N. Dec. 697, 705 n.5 (BIA 1988). The opinion of the Canadian judges in *Musial* quoted above suggests that they would reject the conscientious objector's claim. 1 F.C. at 294 (opinion of Pratte, J., joined by Culliton, D.J.). And the Immigration Appeal Tribunal of the United Kingdom, interpreting the "for reasons of" language in the Convention as incorporated into British statutory law, rejected the asylum claim of a Jehovah's Witness who faced "a long term of imprisonment for contravention of the law on conscription" if he returned to his native Greece and refused to serve in its armed forces. The rationale of that tribunal is consistent with that of the BIA in this case:

> In our view there is no doubt that the appellant has a well-founded fear of being punished if he has to

[5] That question is presented by the government's pending petition for a writ of certiorari in *INS* v. *Canas-Segovia*, No. 90-1246 (filed Feb. 6, 1991). Although we agree with amici Lawyers Committee, Br. 13-19, that conscientious objectors who face *disproportionately* severe punishment on account of their religious beliefs are eligible for asylum, we disagree, for the reasons stated in our petition (at 14-20), that the enforcement of universal conscription laws with uniform penalties for draft evasion constitutes persecution.

> return to Greece. * * * The question remains: In this case is it persecution for reasons of religion or political opinion? We do not think that it is. The immediate cause of the persecution is a refusal to obey the law of the land, and the fact that such refusal may be due to religious beliefs or political opinion is in our view only the secondary cause. If the Jehovah's Witnesses in Greece were being persecuted for reasons of religion one would expect that their teachings and meetings would be proscribed. This is evidently not the case and they appear to be free to worship as they please. We do not consider that the relevant law is discriminatory, because it appears to us that other religious orders with similar views as to military service (Quakers for example) and indeed persons with no religious beliefs at all but whose conscience compelled them to refuse service, would all be treated in the same way.

Dooneias v. *Secretary of State for the Home Department*, as quoted, approved, and applied in *Atibo* v. *Immigration Officer, London (Heathrow) Airport*, Imm. A.R. 93 (1978). The same analysis applies here: because respondent was threatened for his conduct without regard to the opinion that motivated it, he was not "persecuted on account of * * * political opinion." The persecutor's motive is determinative.

2. Respondent is not eligible for asylum even on the tests proposed by him and his amici.

a. In the court of appeals, respondent asserted that by refusing to join the guerrillas he was "asserting his neutrality." Resp. C.A. Br. 7. Reversing field in this Court, respondent now implies that he refused to serve because he supports the government of Guatemala, quoting his statement that he did not want to be "against the government." Resp. Br. 9 (quoting C.R. at 64).

A review of the entire exchange between respondent and his trial counsel, however, makes clear that respondent's refusal to oppose the government was instrumental, not political. To join the guerrillas, respondent explained,

"is to die there" as once "you are against the government" then "the government is against you and against your family." C.R. at 64. Ultimately, respondent confirmed that his refusal to join was caused by his fear of death, not political aversion: "I was afraid to join the guerrillas, yes." *Ibid.* This is exactly how the Immigration Judge viewed the testimony: "The respondent testified that he did not want to join the guerrillas because [they] are against the government and he was afraid that the government would retaliate against him and his family if he did join." *Id.* at 55. The record in this case reveals that respondent refused to join the guerrillas for the entirely understandable purpose of self-preservation. Neither respondent's refusal to join, nor the guerrillas' recruitment of him, had anything to do with respondent's political opinion.

b. Amicus UNHCR proffers a different, even more flawed application. A refusal to join a guerrilla group, it argues, expresses a political opinion regardless of the applicant's actual motivation:

> Regardless of the precise characterization of an individual's motives, the conscious refusal to join a guerrilla group inevitably places the individual in *political* opposition to that group. "Refusal to bear arms, however motivated, reflects an essentially political opinion * * *; it is a political act." G. Goodwin-Gill, [*The Refugee in International Law*] 34 [(1983)].

UNHCR Br. 18 (ellipsis in original); see also American Immigration Lawyers Association (AILA) Br. 20. For three reasons, the UNHCR's position is in error.

First, the UNHCR's theory must apply not only to those evading guerrilla conscription, but to those dodging government drafts as well. After all, it is as much a political statement to resist the draft as it is to resist the guerrillas. In fact, the quotation on which the UNHCR relies does not refer to guerrilla conscription; it refers to governmental conscription. Without the convenient ellipsis, it reads: "Refusal to bear arms, however moti-

vated, reflects an essentially political opinion regarding the permissible limits of *state* authority; it is a political act." G. Goodwin-Gill, *supra*, at 34 (emphasis added). Thus, the UNHCR's view makes every draft-dodger a refugee.

Respondent and his amici attempt to distinguish government conscription from guerrilla conscription, correctly pointing out that international law permits military conscription and distinguishes it from kidnapping. Resp. Br. 18-19; UNHCR Br. 21. But the authority they cite, G. Goodwin-Gill, *supra*, does not differentiate between governments and guerrillas. Nor does the Refugee Act: it distinguishes between persecution and other conduct, not between authorized and unauthorized persecution. Whether certain acts amount to persecution cannot depend on whether the perpetrator is a guerrilla or a government representative; what distinguishes persecution from other forms of oppression is why the victim is selected—not by whom.

Any distinction between legitimate and illegitimate conscription would require precisely the type of ad hoc political judgments to which respondent and amici object, AILA Br. 7-19; see Resp. Br. 25-26: The BIA would have to decide which governments are legitimate (and can therefore operate a draft) and which are not. The Refugee Act neither requires nor permits the BIA to decide such questions. It need only decide a case-specific factual question: whether the applicant reasonably fears that someone is motivated to harm him because of his political opinion.

Second, the argument that a refusal to take up arms with a guerrilla band is necessarily "political" is logically and empirically false. An asylum applicant's refusal to bear arms may reflect a fear of combat, a desire to let others do the hard work of the revolution, or any number of other reasons having nothing to do with his political opinion. In fact, it was one of those non-political reasons that motivated respondent: he has never stated that he lacks sympathy for the guerrillas, or that he supports the government. Instead, he said he was afraid of being

killed. Mortal fear, no matter how understandable, is not a political opinion.

Third and most important, the UNHCR's construction ignores the requirement that the fear be of "persecution on account of * * * political opinion." A guerrilla group's threat of punishment for refusing to join them does not necessarily reflect hostility toward the recruit's political opinion. Guerrillas may threaten people for reasons that have nothing to do with political opinion, the most likely of which is that such threats increase their recruitment rate. That is what the record suggests motivated the guerrillas here. Nothing the guerrillas did or said suggested they thought respondent held an improper political opinion; they even offered to pay respondent for joining them. Gov't Br. 5. Indeed, the mere fact that the guerrillas tried to recruit respondent in the first place suggests they did not see his political beliefs as undesirable: common sense and the BIA's experience both suggest that guerrillas would not invite a suspected "political enemy," Resp. Br. 11, to become a comrade in arms. See *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 514-515 (1988).[6]

At bottom, respondent and his amici never explain why conscription amounts to persecution. Respondent's situation is wholly unlike that of the Christians under the Romans, the Jews under the Nazis, or any other people who were made to suffer for their race, nationality, or beliefs. Nothing in the record suggests respondent was singled out because of his opinions—whatever they are. Contrary to Amicus American Immigration Lawyers Association, Br. 26, we recognize that Jews fleeing Nazi Germany would have been eligible for asylum under the subsequently enacted Refugee Act. But the Act should not be stretched to cover those who were not singled out

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[6] This is not *always* the case. In World War II, the Nazis used Polish and Russian prisoners of war to clear minefields, and the North Vietnamese allegedly did the same with South Vietnamese POWs. There is no evidence that Guatemalan guerrillas engage in that type of barbarism; nor is there any evidence that they intended so to employ respondent.

on the basis of one of the five listed characteristics. As Judge Sneed recently wrote:

> We distort the meaning of an important requirement for refugee status when we permit political aloofness to serve as an active "political opinion," that endangers its holder. It also demeans the true martyr for whom asylum was intended.

Mendoza Perez v. *INS*, 902 F.2d 760, 767-768 (9th Cir. 1990) (concurring opinion).

3. Respondent's and the UNHCR's proposed expansion of asylum eligibility also conflicts with Congress's decision not to "expand the numbers of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb." H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979).[7]

Although the Refugee Act may have a "broad, humanitarian purpose," Resp. Br. 16; see UNHCR Br. 10, that purpose is not without bounds. Congress specifically rejected a proposed definition of refugee that included persons displaced by civil strife. Gov't Br. 17-20. Respondent is one of those people Congress excluded. He left his country because civil war made it unlivable; he was, in the words of the rejected Senate bill, "displaced

[7] Respondent accuses us of misreading the legislative history on this point. Resp. Br. 16-17 n.24. He is mistaken. Respondent's quotation from the House Report leaves off the critical last sentence, which explains *why* the Refugee Act does not expand the number of aliens receiving asylum: the Act "does not create a new and expanded means of entry, but instead *regularizes and formalizes the policies and practices that have been followed in recent years.*" H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979) (emphasis added). One of the practices that was regularized and formalized by the Refugee Act was requiring evidence of the persecutor's motive. See, *e.g.*, *Matter of Pierre*, 15 I. & N. Dec. 461, 463 (BIA 1975) (rejecting claim of persecution where the only demonstrated motive was strictly personal); *Matter of Diaz*, 10 I. & N. Dec. 199, 201-202 (BIA 1963) (rejecting claim where nothing suggested that anyone would denounce the applicant for political, as opposed to personal, reasons).

by military * * * disturbance" and "unable to return." S. 643, § 101(A)(42), S. Rep. No. 256, 96th Cong., 1st Sess. 20 (1979). There is no evidence that he left because he feared being singled out because of his political opinion.

a. As respondent points out, the "term 'displaced persons' would have applied to persons who * * * were located within their own countries." Resp. Br. 17. From this, respondent seeks to imply that Congress rejected the displaced persons provision not because it included people like respondent, but because it included people who, unlike respondent, were in their own countries when they applied for asylum. But if Congress had intended only that change, it would have so amended the provision. It did not. Instead, it rejected the provision entirely, excluding not only victims of military disturbance who were still in their own countries but also those who, like respondent, had already entered this country.

Amicus UNHCR contends that Congress rejected the displaced persons provision because it wanted to differentiate between victims of "targeted persecution" and victims of "civil strife." UNHCR Br. 20. Aside from the redundancy of the phrase "targeted persecution" (persecution is by definition intentional and directed), we agree. But the Refugee Act requires not just that the applicant be a target; he must be a target because of his political opinion or one of the four other statutory bases of eligibility.

b. Despite its broad, humanitarian purpose, Congress adopted a precise definition of "refugee." Congress did eliminate numerous barriers to asylum, such as certain ideological and numerical restrictions. Resp. Br. 16-17. But the elimination of those restrictions was, in part, what prompted Congress to reject an expansive definition of "refugee": if feared an overwhelming influx of asylum applicants. Gov't Br. 20. Yet that is exactly what respondent's and amici's constructions would invite.

Respondent's and his amici's position makes all those who reasonably fear guerrilla conscription eligible for

asylum. See, *e.g.*, UNHCR Br. 20. There are millions of combat-age males in Guatemala, El Salvador, Honduras, and Nicaragua alone,[8] most of whom have reason to fear being approached by guerrillas at some point in their lives. Indeed, respondent's argument must be extended to those who reasonably fear being approached by the government as well, as government conscription cannot be distinguished from conscription by guerrillas. Pp. 9-10, *supra*; see *e.g.*, *Sanchez-Trujillo* v. *INS*, 801 F.2d 1571 (9th Cir. 1986) (addressing claim that young, male unenlisted Salvadorans are a persecuted group).

We acknowledge the harsh fact that young men in Guatemala face grave danger; but that does not convert them into refugees. For such circumstances, immigration law provides a different mechanism: Section 302 of the Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 5031-5032, which empowers the Attorney General to grant aliens "temporary protected status" on a country-by-country basis if returning them would "pose a serious threat to [their] personal safety" because of "ongoing conflict" in their homeland. *Id.* § 302(b)(1)(A), 104 Stat. 5031. Thus, Congress did provide for victims of civil strife like respondent; but it did so by authorizing the Attorney General to grant temporary protected status, not asylum.[9]

4. In *Cardoza-Fonseca*, this Court invited the BIA to develop the meaning of "well-founded fear of persecution" through case-by-case adjudication. See *Cardoza-Fonseca*, 480 U.S. at 447-448. In the five years since

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[8] See *Encyclopedia of the Third World* 630, 762, 848, 1435 (3d ed. 1987) (more than 1 million youths (persons aged 15-24) in El Salvador, more than 1.5 million youths in Guatemala, more than 800,000 youths in Honduras, and more than 656,000 youths in Nicaragua, about half of whom are male).

[9] Currently, only nationals from four countries—El Salvador, Lebanon, Kuwait, and Liberia—are eligible for temporary protected status. Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 5036; 56 Fed. Reg. 12,745-12,746 (1991).

Cardoza-Fonseca, the BIA has invested its experience and energy into developing the meaning of the Refugee Act. That effort merits deference.

a. Contrary to respondent's and amici's contention, determination of the persecutor's motive is not impossible, and it does not involve getting "names and addresses" of the guerrillas and inquiring into organizational intent. Resp. Br. 13; see also UNHCR Br. 16; AILA Br. 21. The BIA does not require "direct" proof of "exact" or "specific" intent. Resp. Br. 21. It only requires evidence from which the persecutor's motive may be fairly inferred. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987) (applicant can meet burden by showing persecutor is aware or could become aware of his political opinion and has the power and inclination to punish him for it); see also *Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276, 286-287 (BIA 1985) (rejecting asylum claims where applicants produced no "objective facts that support an inference" of persecution).

This is not too much to ask. For one thing, the statute requires it. For another, it is eminently reasonable. Often, the act of persecution itself demonstrates motive. For example, a cross burned on a black person's lawn or a swastika scrawled on a Jewish Temple itself announces the perpetrator's motive—racial or religious animus. See, *e.g.*, *Matter of Villalta*, Int. Dec. 3126 (BIA 1990) (white hand with "E.M."—"Escuadron de la Muerte"—painted on a door indicated that El Salvadoran death squads had singled out the applicant for his political opinion). Indeed, those who seek to repress political beliefs usually make sure the victim and his associates know their motive: they thereby ensure that everyone is aware of how dangerous a politically incorrect thought can be.

In asylum cases, the BIA carefully examines the facts, searching for indications that the persecutor might want to hurt the applicant because he disagrees with the ap-

plicant's political opinion.[10] The BIA considers, for example, whether there is any evidence that the applicant has political beliefs that he has expressed by words or conduct, whether the persecutor has become aware of those opinions, and whether the persecutor has indicated that he views the applicant's beliefs as inimical. If the answers to all of those inquiries are no, there is no proof that the forced recruitment was "on account of" the applicant's political opinion. See Pet. App. 32a-33a; see *e.g.*, *Matter of Vigil*, 19 I. & N. Dec. 572, 576-577 (BIA 1988); *Matter of Maldonado-Cruz*, 19 I. & N. Dec. at 513-516.

One need look no further than the unpublished opinions cited by respondent for proof that applicants are capable of producing, and the BIA is sensitive to, evidence of motive. In many of those cases, the BIA concluded that a reasonable applicant would infer that the persecutor had singled him out because of his political opinion.[11]

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[10] Asylum applicants, by regulation, bear the risk of nonpersuasion. 8 C.F.R. 208.13(a). Contrary to respondent's assertion, Resp. Br. 11, that burden does not shift to the INS. That approach is sensible because, in the usual case, only the applicant is capable of producing evidence; the INS cannot send personal investigators to the applicant's homeland.

[11] For example, in *Matter of Re*, No. A 29 773 836 (BIA Dec. 28, 1990), the Afghani government interrogated the applicant and accused him of being a spy after he refused to join communist and pro-communist youth organizations, demonstrating that they perceived him as a political enemy. *Id.* at 83-84; accord *Matter of Diaz-Morales*, No. A24 584 030 (BIA Aug. 14, 1987) (union organizer who espoused the view that citizens had the right to organize and participate in government reasonably feared persecution on account of political opinion where (1) the secret police twice detained him and ordered him to stop organizing unions; (2) expert testimony established that the government viewed union leaders as political subversives and systematically liquidated them; and (3) experts testified that the applicant would face the same fate if he returned even if he were not active in unions); *Matter of Gutierrez-Cano*, No. A26 677 072 (BIA Aug. 3, 1987) (granting asylum where: (1) the applicant and his family had a definite political opinion to which the Sandinistas were hostile; (2) the applicant's membership in the Liberal Party and the prominence of his family in the Somoza government combined with his refusal to join pro-Sandinista groups made or could have made the Sandinistas aware of his political view; and (3) the Sandinistas demonstrated an ability and willingness to persecute him by imprisoning his aunt for two months, labelling her an "enemy" of the revolution, warning the applicant that he could not continue studying unless he joined a pro-Sandinista group, and telling him that he would "regret" not joining).

b. The BIA's decisions holding that the asylum applicant need not prove the "specific," "exact," or "precise" motivation of the persecutor, Resp. Br. 7, 21, or introduce "direct" evidence of his intent, Resp. Br. 13, are entirely consistent with its decisions that forcible recruitment is not necessarily "persecution on account of * * * political opinion." The meaning of a statutory requirement is distinct from the evidence necessary to meet it. A court can require evidence that the respondent's political opinion motivated the persecution without requiring affidavits from the persecutor or other unreasonable forms of proof. And that is what the BIA has done: the applicant need only produce evidence from which the persecutor's motives can be fairly inferred.

c. Nor is the BIA inconsistent on whether forcible recruitment is persecution "on account of * * * political opinion."[12] While respondent and amici rely heavily on the BIA's decision in *Matter of Salim*, 18 I. & N. Dec. 311 (1982), Resp. Br. 24-25; AILA Br. 8-10, 16 & nn.22, 24, 18 n.28, that case was an unremarkable decision on its facts. The applicant reasonably feared arrest for his membership in the Mujahidin rebels opposing the Soviet occupation in Afghanistan; his brothers had been ar-

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[12] Amici Lawyers Committee argue (Br. 4 n.3, 8 n.7) that the BIA has been inconsistent inasmuch as it does not require proof of the persecutor's motive where conscientious objectors suffer disproportionately severe punishment. Punishing conscientious objectors more severely than others who engage in identical conduct, however, *must* be motivated by the conscientious objector's political or religious opinion: there is no other reason why otherwise identically situated individuals would be treated differently.

rested on account of their membership. 18 I. & N. Dec. at 312. The decision, however, relied on Salim's refusal to serve in the occupying Soviet army, holding that forcing Salim to serve in a foreign force would constitute persecution. *Id.* at 313. However unsatisfying the rationale, respondent and amici make far too much of it.

Salim was the first draft evasion case the BIA considered under the Refugee Act of 1980. Musalo, *Refuge for Conscientious Objectors*, 26 San Diego L. Rev. 849, 861 (1989). While it may have been a false start, it was quickly corrected: to our knowledge, it was never followed in any context other than the Soviet invasion of Afghanistan. Indeed, *Salim* is now a dead letter, since the Soviets have withdrawn. See *Matter of Izatula*, Int. Dec. No. 3127 (BIA Feb. 6, 1990).[13]

5. This Court should not remand for further fact-finding. Although the BIA held that respondent's fear was not well-founded,[14] it also held that he failed to prove

[13] Amicus American Immigration Lawyers Association argues an additional ground for refusing to defer to the BIA's position: that the Refugee Act was intended to restrict the Executive's discretion in immigration policy. AILA Br. 26-29. The argument is both correct and meaningless. Of course the Refugee Act limited the Executive's discretion: the Executive only *executes* the statute enacted by Congress. Where the statute leaves gaps, however, this Court has reasonably understood Congress to have delegated policy-making authority to the agency entrusted to administer that statute, leaving it to the agency to fill those gaps. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). In that event, the agency's interpretation is entitled to substantial deference. *Ibid.* Congress delegated administration of the immigration laws to the Attorney General, see 8 U.S.C. 1158; 8 U.S.C. 1103, who has, through the BIA, developed substantial experience in these matters. Therefore, to the extent that "persecution on account of * * * political opinion" presents gaps in meaning which may be fleshed out through the BIA's experience and expertise, the BIA's interpretation must be accorded substantial deference. This Court has already so held. *Cardoza-Fonseca*, 480 U.S. at 447-448.

[14] Respondent remained at home for two months after the guerrillas visited, C.R. at 55, and told INS agents he came to the U.S. for economic reasons, *id.* at 56. See Pet. App. 30a-32a.

that what he feared was "persecution on account of * * * political opinion." Pet. App. 32a-33a ("It can hardly be said that the guerrillas, in any of their visits, sought to harm the respondent for having opinions they found offensive."). Thus, contrary to respondent's contention, Resp. Br. 26, the rule of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 199 (1947), does not apply since we defend the BIA's *ratio decidendi*, not a post-hoc rationalization by INS counsel. Indeed, remand is expressly prohibited by statute. Where, as here, the BIA, as the Attorney General's delegate, makes a finding based on "reasonable, substantial, and probative evidence," the Immigration and Nationality Act provides that a petition for judicial review "shall be determined solely upon the administrative record upon which the deportation order is based" and that a finding of fact, "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." 8 U.S.C. 1105a (a)(4).[15]

Respondent was not misled into thinking that he did not need to prove that the guerrillas threatened him "on account of" his political opinion. The statute requires it. Rulings of the BIA require it. *E.g.*, *Matter of Maldonado-Cruz*, 19 I. & N. Dec. at 513. Even the Ninth Circuit (until recently) required it. See, *e.g.*, *Mendoza Perez* v. *INS*, 902 F.2d at 762 (even if persecution is sufficiently likely, the alien "must also show that the persecution was a result of one of the five characteristics set forth" in the Refugee Act); *Desir* v. *Ilchert*, 840 F.2d 723, 727 (1988) ("[P]ersecution involves 'the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.' *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969)."); *Kovac* v. *INS*, 407 F.2d 102, 107 (1969) (the Refugee Act "shifts the em-

[15] If respondent has new evidence, the proper procedure is for him to file a motion to reopen. 8 C.F.R. 3.2, 3.8, 3.12, 103.5.

phasis from the consequences of the oppressive conduct to the motivation behind it").[16]

In any event, remand would be pointless since the flaw in respondent's case cannot be cured by further fact-finding. Even evidence that Guatemalan guerrillas kill people who do not join them, Resp. Br. 29, would not make respondent eligible for asylum because such retaliation would not be "on account of" respondent's political opinion—it would be intended to terrorize prospective recruits into joining. In this case, the certified administrative record establishes that neither respondent's refusal to join the guerrillas nor their threat of harm was on account of respondent's political opinion.

For the foregoing reasons and those stated in our opening brief, that part of the court of appeals' judgment holding respondent eligible for asylum should be reversed.

Respectfully submitted.

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Solicitor General

SEPTEMBER 1991

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[16] Although such proof is not essential under current Ninth Circuit case law, an applicant still has every incentive to present it to strengthen his claim. See *Canas-Segovia* v. *INS*, 902 F.2d 717, 726 (9th Cir. 1990).

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